Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 05-255
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COMMENTS OF VERIZON ON "70/70 Test"

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Regardless of whether the Commission determines that the so-called "70/70 test" has been satisfied—that is, whether cable systems with 36 or more channels pass 70 percent of households, and 70 percent of those households subscribe to cable service—it can and should adopt rules to effectuate the pro-competitive purposes of the Cable Act, including in particular Sections 621(a) and 628. If the 70/70 test has been met, then Section 612(g) adds an additional source of Commission authority to adopt rules that will "promote diversity of information sources" by removing roadblocks to video competition.[1] But either way, the facts show that consumers will benefit from additional competitive entry. For example, the Commission recently noted that "communities with overbuild competition experienced lower rates (an average of 23 percent lower for basic cable) and higher-quality service."[2] And in the communities where Verizon is already offering FiOS TV, one analyst found that incumbents

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[1] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, FCC 06-11, ¶ 36 (rel. Mar. 3, 2006) ("*Twelfth Annual Video Competition Report*")

[2] *Twelfth Annual Video Competition Report* ¶ 91.

responded by slashing prices by 28-42 percent in the areas where they faced competition.[3] Therefore, the Commission should act swiftly to remove barriers to competitive video entry.

I. To Promote Diverse Information Sources, The Commission Should Facilitate Competitive Entry Into the Video Market And Remove Barriers To Meaningful Competition.

Regardless of whether the 70/70 threshold has been passed, the Commission should adopt rules that facilitate competitive entry into the video market by removing various roadblocks that make it more difficult for competing providers to enter and compete effectively. Doing so will promote both competition and diversity. Simply put, encouraging more speakers – and additional and competing platforms to carry speech – will also facilitate more (and more diverse) speech. And this is all the more true in this context because, unlike many of the large MSOs who are vertically integrated with content providers and who have an incentive to favor their own content over that of competing, independent programmers, competitive providers have an incentive to distinguish their services by carrying a diverse array of programming, including desirable, independent programming that the incumbents do not carry.

Verizon's FiOS TV proves this common sense proposition. In order to attract video customers away from entrenched incumbents, Verizon has entered carriage arrangements with an extremely diverse range of content providers, including with programmers like The American Channel or various niche channels that have had difficulty gaining carriage from the cable incumbents. In fact, FiOS TV already offers one of the most diverse programming line-ups in the history of the business. This includes more than 50 ethnic channels that are available to all of

[3] David W. Barden and Douglas Shapiro, Bank of America Equity Research, *Battle for the Bundle: Consumer Wireline Services Pricing*, at 10 (Jan. 23, 2006).

our subscribers across our footprint – not just in selected areas.[4] Thus, where it has been able to compete, Verizon is already bringing much needed diversity in programming to the public.

Programmers agree that promoting video competition will increase the diversity of information sources available to the public. For example, the National Association of Broadcasters recently stated in the Commission's *621 Franchising Proceeding* that "[t]he emergence of another platform will provide programmers unaffiliated with cable operators with an additional outlet for reaching viewers and therefore with greater opportunities for success in the marketplace," and "may also encourage the development of innovative digital television programming."[5] Similarly, the Video Access Alliance – "an advocacy and advisory group for independent, emerging and minority networks, content providers, programmers, entertainers, and other industry participants" – recognized that "[i]ndependent and minority networks are all but locked out of existing video platforms."[6] This group recognized that promoting competitive entry into the video market "is the most effective vehicle to encourage multiple platforms for delivering programming, support emerging and independent networks seeking outlets for programming." *Id.*

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[4] Verizon is offering subscribers a basic service package @ $12.95/month, an expanded basic package @ $34.95/month, or a Spanish-English package called La Conexion at $32.95/month. La Conexion includes more than 20 of the hottest Spanish-language channels, more than 30 of the most popular English channels, and local channels such as Telemundo, Univision, and Telefutura. Verizon offers an additional all Spanish-language package with more than 20 channels of news, sports, movies, telenovelas, and more for an additional $11.95/month. Our subscribers may also select other individually priced international channels in Vietnamese, Chinese, Mandarin Chinese, Japanese, Korean, Arabic, Italian, French, Polish, Farsi, and Russian.

[5] Comments of National Assoc. of Broadcasters, Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311 at 2-4 (filed Feb. 13, 2006).

[6] Comments of Video Access Alliance, Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311 at 1 (filed March 27, 2006).

Therefore, the Commission should act to promote both competition and diversity by removing roadblocks to entry into the video market.

A. The Largest Barrier to Video Competition Is the Current Local Franchising Regime.

As Verizon and other commenters have documented in the *621 Franchising Proceeding,* the single largest barrier to competitive entry comes from the current local franchising process.[7] This process is plagued by inordinate delay and by unlawful demands and regulatory overreach by some local franchising authorities ("LFAs") that seek to condition the award of a competitive franchise on conditions or concessions that violate the Cable Act. And in order to forestall competition, cable incumbents actively encourage and exacerbate the burdens of the franchising process. If the 70/70 threshold has been passed, Section 612(g) would merely add to the Commission's independently existing authority to remove these barriers to entry.[8]

In order to address these issues, the Commission should adopt the rules Verizon proposed in its comments in the *Section 621 Franchising Proceeding* to prevent certain common franchising practices that violate the Cable Act and that prevent competitive entry. These frequently encountered roadblocks to competitive entry are impermissible under the Cable Act and the First Amendment, and impermissibly limit the diversity of information sources.

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[7] *See,* Comments of Verizon, Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311 (filed Feb. 13, 2006); Reply Comments of Verizon, Implementation of Section 621(a) of the Cable Communications Policy Act of 1984, MB Docket No. 05-311 (filed March 28, 2006).

[8] Section 612(g)'s limitation against Commission preemption of "authority expressly granted to franchising authorities under this title" does not prevent the Commission from adopting the rules Verizon requests here. 47 U.S.C. § 532(g). All of the relief that Verizon requests here and in the the *621 Franchising Proceeding* is consistent with the Cable Act, including the Act's franchising provisions. In fact, these rules are aimed at unreasonable and unlawful actions that *violate* the Cable Act.

B. Effective Program Access Regulation Is Essential to Competitive Entry.

An additional obstacle to video competition – and thus diversity of information sources – comes from the steps taken by vertically integrated cable incumbents to make it more difficult for new entrants to gain access to programming on fair and commercially reasonable terms. The Commission has previously recognized that programming is a "vital input" for a video services provider, and that incumbents can "erect a potential entry barrier that impedes or deters competitive entry" by foreclosing a new competitor's access to desirable programming. *First Video Competition Report*, App. H ¶ 43. "This foreclosure can occur either through the bargaining power of a large incumbent (an MSO for example), or by the downstream firm vertically integrating into the programming market and refusing to sell its programming to actual or potential rivals." *Id.* In fact, as Verizon recently explained in the *621 Franchising Proceeding*, Verizon has already experienced each of these problems. *Verizon 621 Franchising Comments*, Attachment A, at ¶¶ 64-75.

In order to minimize this potential barrier to entry, the Commission should close the "terrestrial loophole," which allows large cable operators to shield certain valuable programming – most especially regional sports programming – from the program access rules. The Commission also should strictly enforce the current program access regulations to prevent other anticompetitive practices that harm competitive providers, and consider additional steps to ensure that new entrants can receive on fair and commercially reasonable terms the programming that they need to compete. By preventing actions that make it more difficult for new entrants to compete effectively, the Commission would further Congress' interest in fostering a diversity of information sources.

1. The Terrestrial Loophole Must Be Closed.

Incumbent cable companies have long used their ties to producers of video programming to hamper entry. Among other things, programmers affiliated with cable companies either refused to sell their programming to competing distributors like satellite carriers and cable overbuilders or sold it on discriminatory terms calculated to suppress competition. To put a stop to these discriminatory practices, the 1992 Cable Competition Act contained program access rules that prohibit exclusive contracts between cable companies and affiliated programmers, absent express FCC approval. These rules require that any cable network programming that is at least in part owned by a cable operator and delivered by satellite must be made available to competitors.[9]

Under the terms of the Act, the FCC was required to determine in 2002 whether those rules should continue to apply, and it concluded that they should.[10] The FCC found that "marketplace evidence . . . tends to confirm that, where permitted, vertically integrated programmers will use foreclosure of programming to provide a competitive edge to their affiliated cable operators. The evidence suggests that the ability to foreclose vertically integrated programming is especially significant in the regional programming market, which may not be covered by the rules if the programming is distributed terrestrially."[11] While the Commission noted that "terrestrial distribution of programming could have a substantial impact on the ability

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[9] *See* 47 U.S.C. § 548(c)(2); 47 C.F.R. § 76.1002(c).

[10] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124, ¶ 80 (2002).

[11] *Id.* at ¶ 59 (footnote omitted).

of competitive MVPDs to compete in the MVPD market," the Commission in 2002 declined to extend the program access rules to cover terrestrially distributed programming.[12]

Without access to terrestrially delivered programming – especially regional sports programming – new entrants are at a serious disadvantage when competing against incumbent cable companies. For example, in some areas, the local incumbent owns a regional sports network that controls the rights to the majority of the professional sports teams in the market. If, through use of the terrestrial loophole or otherwise, the incumbent is permitted to deprive competitors of reasonable access to this highly desirable and unique programming, then many consumers simply will not consider switching to the competitor.

Therefore, in order to encourage video competition and a diverse array of information sources, the Commission should close the terrestrial loophole. Assuming the 70/70 threshold has been met, Section 612(g) provides the Commission with an additional source authority to do just that.[13]

2. The Commission Should Ensure That New Entrants Gain Access to Programming on Fair and Reasonable Terms.

Section 628 also prohibits "unfair methods of competition or unfair or deceptive acts or practices, the purpose *or effect* of which is to hinder" competitive providers' ability to compete.

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[12] *Id.* at ¶ 73.

[13] Although Congress focused in Section 628 on whether programming was delivered by satellite in some portions of Section 628, technological changes since 1992 (including the proliferation of available fiber) have made terrestrial delivery an easy alternative for the delivery of video programming and an appealing option for a cable operator who seeks to shield important programming from the program access rules. These changes would allow the exemption of terrestrially delivered programming to swallow the rule. Therefore, the Commission possesses authority to close the terrestrial loophole in order to prevent the program access rules from becoming a nullity. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (noting FCC authority to take steps that are "reasonably ancillary to the effective performance of the Commission's various responsibilities" and that further the purposes of the Act); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999).

Section 628 codified at 47 U.S.C. § 548(b) (emphasis added). In particular, this rule "prohibit[s] discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors". 47 U.S.C. § 548(c)(2)(B). The Commission should rigorously enforce this anti-discrimination provision.

In addition, the Commission should take steps to ensure that vertically integrated cable operators and content owners do not, as a practical matter, foreclose a competitor's access to content. For example, as Verizon explained in the *621 Franchising Proceeding*, numerous cable operators have refused to interconnect with Verizon for purposes of transmitting a municipality's PEG channels – an action that has no possible justification other than forcing Verizon to incur unreasonable and unnecessary expense to carry channels that it is required to carry. The Commission should adopt rules to prevent these anticompetitive efforts.

3. The Commission Should Also Prevent Harm To New Entrants Resulting from Incumbents' Exclusive Content Agreements.

Similarly, the Commission should take steps to ensure that any exclusive content agreements entered into by incumbent cable operators comply with Sections 616 and 628, given the potential anticompetitive effect of such agreements and should consider adopting additional rules under Section 612(g). As the Commission has previously recognized, incumbent cable operators can effectively foreclose a new entrant's access to necessary programming either through their market power or through control over affiliated programmers. *First Video Competition Report*, App. H ¶ 43. Congress tried to prevent such anticompetitive conduct in two ways. First, Section 628 generally prohibits exclusive arrangements between a cable operator and an affiliated programmer. 47 U.S.C. § 548(c)(2)(C). Second, Section 616 prohibits a cable operator from taking advantage of its position in the market to unduly influence independent content owners, such as by demanding an exclusive arrangement or coercing the programmer to discriminate against a competing video services provider. 47 U.S.C. § 536.

Section 612(g) provides an additional source of authority for the Commission to scrutinize such arrangements. Given the potential impact on a new entrant if it is unable to obtain desirable programming, the Commission should take steps to ensure that cable companies are not able to effectively foreclose access to programming by new entrants through arrangements that give an incumbent an exclusive or unfair right to carry particular programming. For example, the Commission should consider rules to prevent the use of exclusive arrangements as a way to deny access to entrants, such as rules that would prohibit incumbent cable operators from entering exclusive deals for regional sports programming.

C. Incumbents' Exclusive Access Arrangements Are Anticompetitive.

The Commission also should prohibit cable incumbents from entering exclusive access arrangements with MDU owners or real estate developers. These common arrangements make it much more difficult for new entrants to compete, preventing entirely some consumers from having access to the diverse programming offered by competitive providers. Again, Section 612(g) merely provides additional authority to prohibit exclusive access arrangements.[14]

[14] By contrast, exclusive or preferential marketing arrangements differ both conceptually and from a policy perspective from exclusive access arrangements, because they do not restrict the consumer's available choice of providers. Exclusive marketing arrangements facilitate the sharing of information with consumers by creating an active role for MDU owners in distributing information about a provider's services. Such information allows subscribers to better understand the available services and select between available providers, but without dictating who the provider will be. As a result, it would harm competition – and violate the First Amendment – to restrict marketing arrangements between video providers and MDU owners.

The Commission has previously recognized the anticompetitive potential of such arrangements, but concluded that the record at the time included insufficient evidence to support a prohibition on such arrangements.[15] Therefore, Commission precedent currently permits cable incumbents to reach exclusive access agreements with MDU owners and other developers that would lock-in all of the residents, foreclosing competitive entry. The Commission should reconsider this ill-advised policy and recognize that the exclusive access arrangements entered into by cable incumbents are anticompetitive.

In the context of telecommunications services, the Commission already recognized the anticompetitive potential of exclusive access agreements for commercial MDUs.[16] In that proceeding, the Commission concluded that exclusive access contracts were an anticompetitive vertical restraint that "pose[] a risk of limiting the choices of tenants in [MDUs] in purchasing telecommunications services, and of increasing the prices paid by tenants." *Id.* ¶¶ 27, 28. Moreover, for an incumbent, "an exclusive [access] contract may essentially constitute a device to preserve existing market power." *Id.* ¶ 29.

Verizon has consistently argued – both in the context of video and telecommunications services – that exclusive access arrangements are anticompetitive and should not be permitted. Exclusive access arrangements reduce or eliminate tenants' ability to obtain services offered by

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[15] *Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 18 FCC Rcd 1342, ¶¶ 71, 77 (2003).

[16] *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983, ¶ 27 (2000). In that order, the Commission decided that it lacked sufficient record evidence to decide whether exclusive access agreements were permissible in residential MDUs, and issued a further notice on that issue. *Id.* ¶¶ 33.

their choice of service providers.[17] The incumbent cable companies should not be permitted to deprive residents of the benefits of competition, whether for telecommunications or for video.

While the Commission already has authority irrespective of its authority under Section 612(g), the diversity interest animating that provision further illustrates the need for quick action on the part of the Commission to remove this barrier to competitive entry.

II. The Commission Should Consider the Number of Occupied Homes with a Television That Subscribe to Cable Services in Determining Whether the 70/70 Test is Met.

In connection with determining how it should apply the 70/70 test, the Commission also asks several questions, including whether only occupied homes, and whether only households with a television, should be included in this data. The answer to each of these questions is "yes." In fact, the plain language requires that only *occupied* homes be counted, in that the statute refers to "households." As Black's Law Dictionary recognizes, this term does not refer to a physical structure, but instead to "[t]hose who dwell under the same roof and compose a family." *Black's Law Dictionary* (6th Ed.) at 740 (1990). Therefore, there are no unoccupied "households." Similarly, Section 612(g) – and Congress' concern over programming diversity – only makes sense if data are limited to households that include at least one television. Households without a television are simply not relevant to the concerns animating Section 612(g).

The Commission also asks whether "households that subscribe only to non-video services" should be counted towards the second prong of the 70/70 test. The answer to that question is "no." As in the case of deciding whether it is appropriate to limit consideration to households with televisions, the Commission should be guided by Congress' purpose in adopting

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[17] *See, e.g.,* Reply Comments of Verizon, *Promotion of Competitive Markets in Local Telecommunications Markets*, WT Docket No. 99-217, at 4 (filed Feb. 21, 2001); *Verizon 621 Franchising Reply Comments.*

Section 612(g). If a household were to subscribe to cable modem or some other service, but received its video services from a different source (*e.g.*, DBS, a cable overbuilder, over-the-air, etc.), then Congress' concern with diversity of information sources is not implicated. Thus, the data should not count these households for purposes of the test.

CONCLUSION

The Commission already has independent authority to address the roadblocks to video competition discussed above, and regardless of whether the 70/70 test has now been met, the Commission should do so. In Section 612(g), Congress gave the Commission broad additional authority to promote diversity of information sources. The most effective means of exercising that authority would be to adopt rules or take other steps to encourage video competition.

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